IN THE

Supreme Court of the United States

October Term, 1977
No. 77-1308

NATIONAL BROADCASTING COMPANY, INC. and CHRONICLE PUBLISHING CO.,

Petitioners,

vs.

OLIVIA NIEMI, a minor by and through her guardian Ad Litem,

Respondent.

Brief of the California Broadcasters' Association as Amicus Curiae in Support of the Petition for Writ of Certiorari to the Court of Appeal of the State of California, First Appellate District.

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I.

Interest of California Broadcasters' Association.

The California Broadcasters' Association (herein "CBA") is a non-profit California corporation composed of licensees of California radio (both AM and FM stations) and television stations. The CBA has participated in rule making and decisional proceedings before the Federal Communications Commission; it has likewise appeared and represented the broadcast industry before the Federal and State Courts, state and municipal regulatory agencies. The CBA's interest in matters affecting the broadcast industry is well known to the Courts.

In this case, the respondent seeks to recover substantial damages against a broadcaster which did nothing more than show a feature film on the ground that some adolescents who did not see the film allegedly "imitated" one of the scenes contained in the film. The threat of liability and exposure to litigation from multiple litigants would curtail the broadcast industry's First Amendment rights by chilling and impairing the free expression of ideas. It would result in substantial injury to the public interest.

The CBA has a substantial interest in the preservation of the First Amendment rights of the broadcast industry. It is thoroughly familiar with the questions involved in this case. It previously filed a petition seeking leave to file a memorandum brief *amicus curiae* in this matter with the Superior Court in and for the City and County of San Francisco. It filed a brief as *amicus curiae* in the Court of Appeal. It requested permission to file brief and petition for hearing in the Supreme Court of the State of California.

Accordingly, the CBA has a vital interest in seeking review of the lower court's decision which if left undisturbed would subject broadcast stations to the risk of civil damage awards—unlimited in amount and unpredictable in occurrence—as the price of exercising First Amendment rights.

Respondent and petitioners have consented to the filing of this brief and such consent has been filed with the Clerk of this Court.

II.
The Facts.

The facts are derived from Petitioners' Trial Memorandum in the Superior Court.

On September 10, 1974, petitioners telecast a two-hour motion picture entitled "Born Innocent." This was a serious award-winning drama about the harmful effect of "reform school" on one adolescent girl

Respondent claims that on September 14, 1974, she was attacked by third persons and injured as a direct and proximate result of that television program. More specifically, respondent contends that her assailants "got the idea" from viewing the program to insert a beer bottle into her vagina and that it was negligent of the petitioners not to have foreseen this result. (Appendix G, 17a-24a.)

This matter was heard before the Honorable John A. Ertola, who viewed the program to determine whether it was protected by the First Amendment of the United States Constitution and Article I, Section 2 of the Constitution of the State of California. (Appendix D, 10a.)

Judge Ertola granted judgment for the petitioners on the pleadings. (Appendix E, 13a.)

The Court entered the following findings of fact and conclusions of law:

"FINDINGS OF FACT

1. Said motion picture is not, in whole or in part, directed to inciting or producing imminent lawless action.

CONCLUSIONS OF LAW

1. Assuming plaintiff's assailants obtained the idea of assaulting her as a result of the telecast of said motion picture, and assuming the other facts alleged in the Complaint and offered to be proved by plaintiff to be true, the law provides no remedy.

2. Plaintiff's alleged causes of action, and each of them, are barred by the First Amendment to the United States Constitution and Article I, Section 2, of the California Constitution.

3. Said motion picture is not, in whole or in part, directed to inciting or producing imminent lawless action." (Appendix F, 16a.)

Judge Ertola in his decision (Appendix D, 10a-12a) had concluded that "Born Innocent" was absolutely privileged under the First Amendment; the Court had invoked the doctrine of "constitutional fact" in ruling on this issue. *Cf. Rosenbloom v. Metromedia, Inc.* (1971) 403 U.S. 29, 54, 29 L.Ed.2d 296.

The Court of Appeals in reversing the lower Court acknowledged the applicability of the "constitutional fact" doctrine of *Rosenbloom, supra,* but stated that

> "the case is not presently ripe for such a determination, appellant having been deprived of her constitutional right to present before a jury evidence she contends will show that despite First Amendment protections, the showing of the film 'Born Innocent' resulted in actionable injuries." (Appendix A, 6a.)

There is a patent inconsistency in the lower Court's opinion on the applicability of the *Rosenbloom* consti-

tutional fact doctrine. The requirement of a jury trial for respondent would impair and curtail the First Amendment rights of the petitioners.

III.

Question Presented.

The issue tendered by this litigation must be viewed from the following factual perspective. To quote from Mr. Justice Brennan's dissenting opinion in *Columbia Broadcasting System v. Democratic National Committee,* 412 U.S. 94 (1973):

> "Moreover, it is equally clear that, with the assistance of the Federal Government, the broadcast industry has become what is potentially the most efficient and effective 'marketplace of ideas' ever devised. Indeed, the electronic media are today 'the public primary source of information,' and we have ourselves recognized that broadcast 'technology . . . supplants atomized, relatively informal communication with mass media as a prime source of national cohesion and news . . .' Red Lion Broadcasting Co. v. FCC, supra, at 386 n. 15. Thus, although 'full and free discussion' of ideas may have been a reality in the heyday of political pamphleteering, modern technological developments in the field of communications have made the soapbox orator and the leafleteer virtually obsolete. And, in light of the current dominance of the electronic media as the most effective means of reaching the public, any policy that absolutely denies citizens access to the airways necessarily renders even the concept of 'full and free discussion' practically meaningless . . ."

Thus, the issue tendered is as follows:

To what extent does the First Amendment protect the "marketplace of ideas" communicated by the broadcast industry against the civil claims of litigants who contend that broadcasters are answerable in damages for the criminal acts of third parties, based solely on the prospect that a disturbed person "got the idea" from viewing a program on television?

IV.
Reasons for Granting the Writ.

A. Scope of the Problem.

The issue tendered by this case is not limited to "Born Innocent," a dramatic television presentation but it extends to news programs, documentaries and commercials, all of which are protected by the First Amendment. See *Miller v. California* (1973) 413 U.S. 15, 37 L.Ed.2d 419; *Kingsley v. International Pictures Corp. v. Regents of New York* (1959) 360 U.S. 684, 3 L.Ed.2d 1512 (motion pictures); *New York Times v. Sullivan* (1964) 376 U.S. 254, 11 L.Ed.2d 686 (newspapers); *Bigelow v. Commonwealth of Virginia* (1975) 421 U.S. 809, 44 L.Ed.2d 600; *Virginia State Board of Pharmacy v. Virginia Citizens Council, Inc.* (1976) 425 U.S. 748, 48 L.Ed.2d 346 (commercial advertising).

It is hornbook law that "Publications containing criminal news, accounts of criminal deeds, or pictures and stories of bloodshed, lust, or crime are as much entitled to the protection of free speech as other literature." (*Winters v. New York*, 333 U.S. 507, 510 [68 S.Ct. 665, 92 L.Ed. 840], quoted in *Katev v. County of Los Angeles*, 52 Cal.2d 360, 365, 341 P.2d 310 (1959).)

If liability exists in the case at bar, it extends to news programs, documentaries and commercial matter.

News is a staple fare of the broadcast industry; it has been described as ". . . that indefinable quality of interest which attracts public attention" or as a "report of recent occurrence." *Sweenek v. Pathe News, Inc.*, 16 F.Supp. 746 (D.C. N.Y. 1936); *Sutton v. Hearst Corp.*, 277 App.Div. 155, 98 N.Y.S.2d 253 (1950).

If the respondent prevails in the instant case, the broadcast industry is vulnerable to litigation in the following instances:

(a) A radio or television station in its newscasts reports a kidnapping and a demand for ransom. This prompts an increase in the number of kidnappings with increased ransom demands. A kidnapper is apprehended after he has injured a victim. The broadcast industry is sued because the assailant who has been apprehended claims that he "got the idea" from radio and television broadcasts.

(b) Acts of terrorism where innocent citizens held as hostages, accounts of criminal deeds such as murder, arson, robbery, etc.,—all are reported by the broadcast media as news events. A teenager claims that he was induced to engage in criminal conduct injuring third persons because the broadcast media reported the same. A radio or television station reports a suicide occurring on the Golden Gate Bridge. The executor of the estate contends that the news reports by the broadcast industry caused decedent's death. If the rule of liability prevails in the instant case, then all stations would be extremely reluctant to engage in any form of news reporting which would expose them to civil liability.

(c) Sponsors of programs would likewise be exposed to liability. Thus, the current television commercial of the sword swallower who uses a brand name medication to soothe his throat may prompt imitators to invoke the jurisdiction of the Courts claiming that the catalyst for the injury was the television commercial. Another illustration is the commercial where a car is tested by a non-professional driver on a race track or on an open road. A teenager is injured; he claims that the television commercial prompted him to imitate the non-professional driver.

The foregoing illustrations, whether in the areas of dramatic presentations, news and documentaries and commercials can be readily multiplied. And if the respondent's claim in this case prevails, the broadcast industry will be inundated with lawsuits.

B. The First Amendment Protects the "Market Place of Ideas" Communicated by the Broadcast Industry.

If the broadcast industry cannot invoke the First Amendment as a defense against respondent's claim, it will be vulnerable to a plethora of lawsuits. The extent of this litigation and the burdens that it would impose on the broadcast industry and the Courts are horrendous.

The claim asserted by the respondent in the instant case would have a "chilling effect" on the First Amendment rights of the broadcast industry. *Laird v. Tatum* (1972) 408 U.S. 1, 32 L.Ed.2d 154 (1972); *Banzaf v. FCC*, 405 F.2d 1082, 1101-1102 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969).

The following from *New York Times v. Sullivan, supra*, a defamation case, is particularly appropriate:

"What a state may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel. *The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting that the fear of prosecution under a criminal statute.* See *City of Chicago v. Tribune Co.* 307 Ill. 595, 607, 139 NE 86, 90 (1923). Alabama, for example, has a criminal libel law which subjects to prosecution any 'person who speaks, writes, or prints of and concerning another any accusation falsely and maliciously importing the commission by such person of a felony, or any other indictable offense involving moral turpitude,' and which allows as punishment upon conviction a fine not exceeding $500 and a prison sentence of six months. Alabama Code, Tit.14, §350. Presumably a person charged with violation of this statute enjoys ordinary criminal-law safeguards such as the requirements of an indictment and of proof beyond a reasonable doubt. These safeguards are not available to the defendant in a civil action. The judgment awarded in this case—without the need for any proof of actual pecuniary loss—was one thousand times greater than the maximum fine provided by the Alabama criminal statute, and one hundred times greater than that provided by the Sedition Act. And since there is no double-jeopardy limitation applicable to civil lawsuits, this is not the only judgment that may be awarded petitioners for the same publication. *Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to*

> *public criticism is an atmosphere in which the First Amendment freedoms cannot survive. Plainly the Alabama law of civil libel is 'a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law.' Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 70, 9 L.Ed.2d 584, 593, 83 S.Ct. 631." (376 U.S. at 277-78, 11 L.Ed.2d at 705, footnotes omitted and italics ours).

This principle of the *New York Times* case has been reaffirmed many, many times. See *e.g., Time, Inc. v. Firestone,* 424 U.S. 448, 47 L.Ed.2d 444 (1976).

The application of the principle to the claim asserted by respondent would destroy the journalistic discretion of the news departments of radio and television broadcast stations. News editors would be reluctant to report criminal news, accounts of criminal deeds or any other news events which could expose the broadcast industry to civil liability.

The smaller radio stations whose total complement of personnel ranges from five to ten employees would be particularly vulnerable. How can any news reporter whose primary objective is to report the news accurately and as quickly as possible make the requisite judgment that the broadcast of a news event may or may not expose the station to civil liability?

All radio and television stations file applications for renewal of license with the Federal Communications Commission every three years. California licensees

were required to file by August 1 of 1977. The application form requires licensees to specify the amount and percentage of time devoted to news and public affairs programming, etc. Thus, the licensee makes representations to the FCC as to its proposed programming and the Commission expects licensees to comply with such representations.

The smaller stations generally represent that they carry from five per cent (5%) to ten per cent (10%) news programming. Of this percentage of news programming, the Commission inquires as to the amount of local or community news to be carried. The Federal Communications Commission has repeatedly urged licensees as part of their obligation to serve the public interest, convenience and necessity to broadcast "local" news. If the claim of the respondent prevails, there will be a diminution in the reporting of local news and the news furnished by the wire services; and licensees will have to explain to the Commission that they cannot discharge their obligations in the public interest in reporting local and other news because of their possible exposure to civil liability.

Advertisers and sponsors would be required to scrutinize commercial copy to insure that they would not be exposed to civil liability. Advertising has been described as the life-blood of the broadcast industry. Respondent's claim, if upheld, could seriously impair advertising and with it the structure of the broadcast industry.

V.
Conclusion.

For the reasons set forth above, the CBA joins in the request of petitioners that a writ of certiorari be issued to review the judgment and opinion of the California Court of Appeal.

Dated: April 13, 1978.

Respectfully submitted,

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